IN THE SUPREME COURT OF FLORIDA

GEORGE KORDON and LEONA KORDON, his wife,

Petitioners,

vs.

WAL-MART STORES, INC.,

Respondent.
_____/

CASE NO.: 85,922
DCA Case No.: 94-03943

ANSWER BRIEF

VINCENT M. D'ASSARO, ESQUIRE
Florida Bar No.: 0471690
CAMERON, MARRIOTT, WALSH,
HODGES & D'ASSARO, P.A.
15 West Church Street
Orlando, Florida 32801-3301
(407) 841-5030

Attorneys for Respondent

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STATEMENT OF THE CASE AND FACTS

For the purposes of this Appeal, the Respondent adopts the statement of the case and facts as set forth in their initial brief on jurisdiction and would incorporate the Petitioners' statement of facts and case as being representative of the actions taken in this case.

SUMMARY OF ARGUMENT

The District Court of Appeals has properly exercised its certiorari jurisdiction in reviewing the trial court's order denying a motion to strike a claim for punitive damages under §768.72 Fla. Stat., (1993) and thereafter striking the claim for punitive damages. The District Court has based its decision and invocation of its certiorari jurisdiction upon the fact that a prerequisite to naming punitive damages against Wal-Mart Corporation required a showing of independent fault on the part of the Defendant. The Second District Court of Appeals found that there was no showing of independent fault by Wal-Mart in the record before the trial court. This resulted in the finding that there was a legal basis for overturning the trial court's decision to allow punitive damages to be plead.

ARGUMENT

I. WHETHER THE DISTRICT COURT HAS JURISDICTION TO ISSUE A WRIT OF CERTIORARI TO REVIEW A TRIAL COURT'S ORDER DENYING A MOTION TO STRIKE A CLAIM FOR PUNITIVE DAMAGES UNDER §768.72 FLORIDA STATUTES (1993):

The Supreme Court in the Globe Newspaper Co. v. King, 658 So.2d 518, (Fla. 1995) has recently emphasized the procedure to be followed by appellate courts in reviewing a trial court's order granting a plaintiff's amendment to a complaint to include punitive damages. Specifically, the Globe Newspaper Co. decision specified that appellate courts have certiorari jurisdiction to review whether a trial judge has conformed with the procedural requirements of §768.72 Fla. Stat. (1987). The Globe court highlighted Florida §768.72 Fla. Stat. (1987) which provides that:

> In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery or financial worth shall proceed until after the pleading concerning punitive damages is permitted.

Globe Newsppaer Co. v. King, 658 So.2d at 519, citing §768.72 Fla. Stat. (1987).

This case is before this Honorable Court due to application of §768.72 Fla. Stat. (1987). The Respondent asserts that the Second District Court of Appeal was acting within the procedure set out by the Globe Newspaper Co. decision in reviewing and subsequently striking the claim for punitive damages against Wal-Mart.

This case which is present before this Honorable Court originated in the trial court level in a defamation suit by the Petitioner after his termination for eating candy which was still a part of the Respondent's inventory. The Petitioner was permitted by the trial court to amend the original Complaint for defamation thereby adding a claim for punitive damages. This amendment was based upon only three (3) statements by Wal-Mart employees which the Plaintiff alleged constituted defamation.

The first statement was cited in the deposition of Lou Della Bower. Mrs. Bower was reported to have made a statement to several employees who were discussing Mr. Kordon's termination. Specifically, referring to the deposition of Mrs. Bower at Page 42, Line 24 through Page 43, Line 5, the following exchange occurred:

Q. Did you ever communicate to anyone the fact that Mr. Kordon was terminated?

A. I walked up one day and some associates was talking and one of them said about George being terminated. And I said, "[m]aybe there's more to it, let's don't talk about it because you shouldn't be out on the floor gossiping." (See Appendix A.)

Further as to Mrs. Bower, Plaintiff pointed to a telephone call where a manager from Scotty's was inquiring into Mr. Kordon's previous experience with Wal-Mart, on Page 46 of Lou Della Bower's deposition, beginning at Line 10 through Line 18:

Q. And what were you asked by the person from Scotty's?

A. They wanted to know his date of hire and date he left, and if he was rehireable.

Q. Which is in the file no.

Q. And his file says you can't rehire him. Were you asked anything else?

A. She said why. I said because of company policy, a violated company policy.

Q. Is that all you told this person?

A. Yes, it is. (See Appendix A.)

As for any comment by Lou Della Bower to a representative from Scotty's, a close friend of the Plaintiff's, Florene Shinn, is believed to have elicited this statement improperly. According to the testimony of Florene Shinn, while at the Plaintiff's home and in the presence of the Plaintiff, George Kordon's wife, Leona Kordon, Ms. Shinn made a telephone call to Wal-Mart, representing that she was head of personnel from Scotty's, and that she was checking a reference regarding George Kordon. This is presumably the same conversation referenced in Lou Della Bower's deposition. (See Appendix A) According to Ms. Shinn, after representing that she was head of personnel for Scotty's, she then asked if the Plaintiff, George Kordon, was eligible for rehire and what the circumstances for his termination were. (See Pages 10, 11, and 12 of Appendix B.) Ms. Shinn misrepresented herself in order to obtain this statement from Defendant, Wal-Mart Stores, Inc., which is one of the key statements which the Plaintiff relied on for both the defamation and punitive damages claim.

The third statement Plaintiff relies on to show defamation and alleged entitlement to punitive damages was by a co-employee, Donna Larson, in her deposition at Page 13, Line 2 through Line 12:

Q. Do you recall his termination being discussed at any management meetings?

A. Yes.

Q. What was discussed?

A. They...I just remember them saying he had been let go.

Q. Where those the exact words used?

A. I can't remember.

Q. Did management tell or disseminate any reason why he had been let go?

A. I can't remember. (See Appendix C.)

These statements cited by the Plaintiff for the trial court are woefully insufficient to prove any alleged claim for defamation and/or punitive damages.

The Florida case law is clear in allowing punitive damages against a corporate employer.

The Florida Supreme Court addressed the issue of punitive damages in a corporate employer setting in the case of Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981). The Mercury Motors Express, Inc. decision recognized that in order to hold a corporate employer vicariously liable for punitive damages, there must be some fault on the employer's part in addition to the willful, wanton employee misconduct. Id. The Mercury Motors Express, Inc. decision resulted in the Supreme Court eliminating the claim for punitive damages against the corporation based upon the actions of its employee, in driving under the influence of alcohol in a manner that was in a willful and wanton disregard for the life and safety of others. The Mercury Motors Express, Inc. case held that the plaintiff alleged no fault on the part of the employer and was relying entirely upon the master-servant relationship in order make the employer vicariously liable

for the punitive damages. In the case at bar, the evidence presented to the trial court did not include any evidence of fault on the employer's part. Consequently, based upon the Mercury Motors Express, Inc. decision there is no legal basis for the punitive damages in the case before this Honorable Court.

In Key West Convalescent Center, Inc. v. Doherty, 619 So.2d 367, 369 (Fla. 3 DCA 1993), the court addressed an affidavit that the petitioners presented in support of their claim for punitive damages, which cited that the defendant had failed to provide adequate nursing home care. The Key West court held that the affidavit was an insufficient basis to add a claim for punitive damages, as it failed to establish a reasonable basis for recovery of punitive damages under §768.72, Fla. Stat. (1991). The Key West court emphasized that Florida law requires that the character of negligence necessary to sustain an award of punitive damages must be willful, wanton, and intentional misconduct. Key West citing Chrysler Corp. v. Wolmer, 499 So.2d 823 (Fla. 1986). Based upon the Key West decision it is apparent that punitive damages are not appropriate in the case at bar due to the fact that there is no willful, wanton, and intentional misconduct on the part of Wal-Mart. Consequently, the statements in the case at bar do not rise to the level of misconduct sufficient to legally add a claim for punitive damages.

The case of Pier 66 Co. v. Poulus, 542 So.2d 377 (Fla. 4th DCA 1989), resulted in the Fourth District Court of Appeals rejecting a punitive damages claim based upon the legal requirement that a

corporation can only be held liable if a managing agent of the corporation itself can be charged with uttering the defamatory statement. In Pier 66 Co., an employee was fired and due to the circumstances of his termination, a newspaper article was published. The manager of a hotel which was owned by Phillips Petroleum (defendant) made an alleged defamatory statement in a newspaper about the circumstances of the individual's termination. The manager stated, "[t]he timing of the firing was very poor, but was bound to happen because Ms. Poulus hasn't been working out in her post as a sales representative." Pier 66 Co. at 379.

The Court would not hold Phillips Petroleum liable for the punitive damages because a managing agent of the corporation must be charged with making defamatory statements. They specifically rejected the idea that statements from the manager of the individual hotel were sufficient to support a claim for defamation and punitive damages against the defendant. The plaintiff in Pier 66 Co. joined not only the parent company of Phillips Petroleum, but also the manager, Clyde Chu, as well as other individuals alleged to be involved in the defamatory statements. The court specifically rejected the claim against the parent company, but sustained the claim against the person who made the alleged defamatory statement. The Court stated as follows:

> Additionally, Phillips Petroleum incurs no liability for punitive damages on either claim for wrongful discharge or defamation. Generally, there must be proof of employer fault in order to impose liability for punitive damages. Mercury Motors Express, Inc. v. Smith, 393 So.2d 545 (Fla. 1981). No showing of independent fault is required where the corporate agent is in fact the owner or the managing agent of the corporation sought to

> be charged. See Banker's Multiple Line Ins. Co. v. Farish, 464 So.2d 530 (Fla. 1985). However, the defendant Chu was only the hotel manager for Pier 66 Company; he was clearly not a managing agent of Phillips Petroleum Company. (Citations omitted).
>
> Pier 66 Co. v. Poulus, 542 So.2d at 381.

Similar to the case at bar the statements which are alleged to support the claim for punitive damages do not originate from managing agents as defined in the Pier 66 Co. decision. The statements in the case at bar come from mere assistant managers of an individual Wal-Mart Store, and not managerial employees of Wal-Mart Inc. as defined in the Fourth District Court of Appeals case of Pier 66 Co..

CONCLUSION

The decision of the Second District Court of Appeal granting the Writ of Certiorari and striking the claim for punitive damages was appropriate and within the confines of established case law. The certiorari review of the Second District Court of Appeals should be affirmed, and its order approved directing the trial court to strike the punitive damages claim and quash the order compelling financial disclosure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by United States Mail to: **LON WORTH CROW, IV, ESQUIRE**, Attorney for Respondents, Post Office Box 1880, Avon Park, Florida 33825, and to the **HONORABLE ROBERT E. PYLE, CIRCUIT JUDGE**, Highlands County Courthouse, Post Office Box 1827, Sebring, Florida 33871-1827, this 20 day of October, 1995.

CAMERON, MARRIOTT, WALSH,
HODGES & D'ASSARO, P.A.

VINCENT M. D'ASSARO, ESQUIRE
Florida Bar No. 0471690
15 West Church Street
Orlando, Florida 32801-3301
(407) 841-5030 sjm

Attorney for Defendant

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